STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. ___-___-___ Wncv

HUNTINGTON SCHOOL DISTRICT,

Plaintiff / Appellant,

v.

VERMONT STATE BOARD OF EDUCATION,

and

VERMONT AGENCY OF EDUCATION,

and

MOUNT MANSFIELD MODIFIED UNION SCHOOL DISTRICT,

Defendants / Appellees.

COMPLAINT and PETITION FOR DECLARATORY JUDGMENT

NOW COMES Plaintiff / Appellant Huntington School District, by and through its attorneys, Tarrant, Gillies & Richardson, LLP, and submits this Complaint and Petition against Defendants / Appellees Vermont State Board of Education, Vermont Agency of Education, and Mount Mansfield Modified Union School District.

Plaintiff / Appellant also hereby appeals Defendant Vermont State Board of Education's November 30, 2018 decision pursuant to Vermont Rule of Civil Procedure 75.

This action seeks to prevent the unilateral and unconstitutional merger of Huntington School District ("Huntington") and Mount Mansfield Modified Union School District ("Mount Mansfield"). Huntington has historically and traditionally operated as an independent school

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district providing for the education of its students. A series of votes by surrounding towns, pursuant to laws preceding Act 46, resulted in the merger of several nearby school districts into the current Mount Mansfield District. Huntington voters resisted this merger and remained independent.

Currently Huntington owns and operates the Brewster-Pierce Memorial School for the education of children in the Town from pre-kindergarten through grade 4. The school building and grounds are the product of countless hours of volunteer work by Huntington families. School board meetings are highly attended by passionate and informed residents. Through four successive votes, these residents have voiced their desire to continue with the tradition of operating a small, elementary school system under local control.

Now the Defendants in this case are attempting to force the conveyance of the Brewster-Pierce School to Mount Mansfield and to relegate Huntington Town residents to a perpetual minority vote on all matters concerning the education of their children. The State Board of Education, through its Final Report and Order pursuant to Acts 46 and 49, has called for the dissolution of Huntington and merger into Mount Mansfield. It has done so without the scrutiny or approval of the General Assembly, without going through a rulemaking process that includes checks and balances, and without following any adjudicative process. The Final Report and Order is unconstitutional. Huntington needs this Court's intervention to prevent irreparable harm to its school, students, and families; and to bring clarity to the hurried and convoluted implementation of Acts 46 and 49.

In support, Huntington avers as follows:

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PARTIES

1. Plaintiff Huntington School District is a duly incorporated municipality in the County of Chittenden, State of Vermont. It is governed by a five-member board.

2. Defendant Vermont State Board of Education was created by statute. 16 V.S.A. chapter 3. It is an administrative body of the executive branch of government of the State of Vermont, and it is governed by a ten-member Board. 16 V.S.A. § 161.

3. Defendant Vermont Agency of Education was created by statute. 3 V.S.A. § 2701. It is an administrative body of the executive branch of government of the State of Vermont and is under the direction and supervision of the Secretary of Education. Id.

4. Defendant Mount Mansfield Modified Union School District is a modified unified union school district created pursuant to Act 156 of 2012, and a duly incorporated municipality in the County of Chittenden, State of Vermont.

JURISDICTION and VENUE

5. This Court has jurisdiction pursuant to 4 V.S.A. § 31(2). Huntington seeks remedies pursuant to 12 V.S.A. §§ 4711–25 and Civil Rule 75.

6. Venue is proper in Washington County because Defendants Vermont State Board of Education and the Agency of Education are agencies of the State of Vermont. 12 V.S.A. § 402(a).

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CLAIMS

Background

Current governance structure of the Huntington School District

7. Huntington and Mount Mansfield are overseen by the Chittenden East Supervisory Union (CESU), which is managed by a board composed of members of the Huntington and Mount Mansfield boards.

8. Prior to 2014, CESU was composed of seven semi-independent districts: six providing pre-kindergarten or kindergarten through grade 4 (Bolton, Huntington, Jericho, Richmond, Underhill Incorporated District (comprised of parts of Jericho and Underhill) and Underhill Town) and one "unified" district responsible for the education of all children in the CESU communities in grades 5 through 12 (the Mount Mansfield Union School District). Each of the seven districts had its own school board and managed its own budget.

9. With Act 153 in 2010, the General Assembly created the first voluntary merger program, which offered tax reductions and transitional assistance to Regional Education Districts (REDs) created through the merger of at least four districts. REDs could only be created if voters in all of the elementary districts within the unified district boundaries approved their creation.

10. On June 7, 2011, the six CESU elementary districts voted on whether to merge all CESU districts and boards into one RED. Huntington and Richmond voted the proposal down and it failed to advance.

11. The General Assembly subsequently created an exception to the RED program with Act 156 of 2012, which gave tax breaks and transitional assistance to unified districts approved by a majority, instead of all, member elementary districts. Such commingled majority votes allowed for the creation of Modified Unified Union School Districts (MUUSDs), which

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provide for the education of (1) secondary school students of all member towns including minority towns such as Huntington that did not vote in favor of merger and (2) elementary school students only of the member towns whose voters voted in favor of merger. See 2012 Acts and Resolves No. 156.

12. The school districts whose voters rejected merger would continue to exist and operate as independent school districts providing for the education of elementary students.

13. The Secretary and State Board of Education have referred to these independent districts, operating alongside MUUSDs under the umbrella of a supervisory union, as "non-member elementary districts" (NMEDs).

14. The term "non-member elementary district" is not defined in any statute and it appears to be merely a term of convenience rather than a legal term of art.[1]

15. Under this new legislation, a CESU district study committee developed a report and recommendations on merger, including recommended Articles of Agreement, issued July 28, 2014. The Huntington representative on the study committee voted against the Articles of Agreement. Nevertheless, the State Board of Education approved the report and articles on August 19, 2014.

16. On November 4, 2014, another merger vote was held under the new Articles of Agreement. All districts except Huntington voted to merge. Following this vote, the Bolton, Huntington, Jericho, Richmond, Underhill Incorporated, and Underhill Town districts were merged with the Mount Mansfield Union School District to form the new Mount Mansfield Modified Union School District (Mount Mansfield).

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05601-1440

[1] This Complaint/Appeal will use the term non-member elementary district or NMED for the sake of convenience and consistency with language used by the Secretary and State Board of Education, but no special legal meaning is implied.

17. CESU is now composed of two districts: a MUUSD (Mount Mansfield), and an NMED (Huntington). Each district is a separate legal entity, has its own school board, and manages its own budget.

18. Mount Mansfield operates Smilie Memorial, Jericho Elementary, Richmond Elementary, Underhill ID Elementary, Underhill Central School, Browns River Middle School, Camels Hump Middle School, and Mount Mansfield Union High School.

19. Huntington governs the Brewster-Pierce Memorial School, located in Huntington Center, which continues to provide pre-kindergarten through grade 4 for all residents. After grade 4, students from the Town of Huntington attend Camels Hump Middle School in Richmond and Mount Mansfield Union High School in Jericho.

Act 46

20. Vermont's General Assembly passed Act 46 in 2015.

21. Under Act 46, Section 2, the goals of the Act are to encourage and support local decisions and actions that:

> (1) provide substantial equity in the quality and variety of educational opportunities statewide;
>
> (2) lead students to achieve or exceed the State's Education Quality Standards, adopted as rules by the State Board of Education at the direction of the General Assembly;
>
> (3) maximize operational efficiencies through increased flexibility to manage, share, and transfer resources, with a goal of increasing the district-level ratio of students to full-time equivalent staff;
>
> (4) promote transparency and accountability; and
>
> (5) are delivered at a cost that parents, voters, and taxpayers value.

22. Section 5 of Act 46 sets out two forms of "governance structures" that schools may use to meet the Act 46 goals: the "preferred structure" and the "alternative structure."

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05601-1440

23. A preferred structure district (1) is responsible for all pre-kindergarten to grade 12 students; (2) is its own supervisory district; (3) has a minimum average daily membership of 900; and (4) is organized according to one of four "common governance structures."

24. Common governance structures provide schooling for all students from pre-kindergarten or kindergarten through grade 12 via one of the following methods: (1) operating a school or schools through grade 12; (2) operating a school or schools through grade 8 and paying tuition for grades 9–12; (3) operating a school or schools through grade 6 and paying tuition for grades 7–12; or (4) operating no school and paying tuition for pre-kindergarten through grade 12.

25. Act 46, Section 5(c) explains that the preferred structure "may not be possible or the best model to achieve Vermont's education goals in all regions of the State. In such situations, a supervisory union composed of multiple member districts, each with its separate school board [i.e., an alternative structure district], may[2] meet the State's goals . . . ." Section 5(c) explains that alternative structures may meet the Act 46 goals "particularly if" (1) member districts are collectively responsible for all students in the supervisory union; (2) the supervisory union maximizes efficiency; (3) the supervisory union has the "smallest number of member school districts practicable, achieved wherever possible by the merger of districts with similar operating and tuitioning patterns;" and (4) combined average daily membership of not less than 900.[3]

26. Act 46 Section 9 directs existing districts that wish to create alternative structure districts to complete a self-evaluation of their ability to meet Act 46 goals, hold meetings with

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MONTPELIER, VERMONT
05601-1440

[2] Act 49 amends the initial language of Act 46, which read "can meet the State's goals," to read "may meet the State's goals."

[3] Originally 1,100, amended to 900 by Act 49.

other districts to discuss ways to meet Act 46 goals, and submit a proposal to the State Board of Education by November 30, 2017.

27. A Section 9 alternative structure proposal sets out a proposed governance structure, demonstrates how that structure meets or exceeds Act 46 goals, and identifies actions to improve performance regarding Act 46 goals.

28. Under Act 46 Section 8(b), the State Board of Education "shall approve the . . . continuation of a supervisory union" if it concludes that it is the "best means" of meeting Act 46 goals and ensures transparency and accountability.

29. Act 46, Section 10(a) requires the Secretary of Education to review governance structures as they are anticipated to exist on July 1, 2019, including proposals for alternative structure districts, and to present a proposed plan by June 1, 2018 that would create preferred structure districts. Section 10(a) also allows the proposal to include alternative structure districts "as necessary" and "[i]f it is not possible or practicable to develop a proposal that realigns some districts" into preferred structure districts (emphasis added).

30. Act 46, Section 10(b) requires the State Board of Education, by November 30, 2018, to "approve the [Secretary's] proposal either in its original form or in an amended form" and publish "its order merging and realigning districts and supervisory unions where necessary."

Act 49

31. Merged school districts are governed by Articles of Agreement. See 16 V.S.A. § 706b(b). These agreements designate the method of apportioning representation between municipalities, management of debt and assets, and other matters.

32. Prior to the passage of Act 46, existing law for creating new union school districts required each individual district that would be merged into the new union school district to assent

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P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

by majority vote to key articles in new Articles of Agreement regarding key issues such as the transfer of property and debt. See 16 V.S.A. §§ 706–706n.

33. Act 46 is silent on what elements of the Articles of Agreement require a vote or how those votes would be conducted.

34. The General Assembly attempted to address this uncertainty and other unclear provisions of Act 46 by passing Act 49 of 2017. As particularly relevant here, Section 8 of Act 49 amends Section 10 of Act 46.

35. Under the amended Act 46 Section 10(d)(1), districts subject to merger under the State Board of Education's November 30, 2018 final report and order (including those subject to involuntary merger) have 90 days to form a committee under 16 V.S.A. chapter 11 to draft Articles of Agreement for the new district.

36. Under amended Act 46 Section 10(d)(2), if the committee's Articles of Agreement are not approved in 90 days, the State Board of Education's default Articles of Agreement included in the November 30, 2018 final report and order apply to the new district.

Activity Since Acts 46 and 49

37. Following the passage of Act 46, the Town of Huntington held a vote on whether to merge with Mount Mansfield at Town Meeting Day on March 1, 2016. The Town voted against merger at that time.

38. As the Act 46 process moved forward, and after much discussion, the Huntington Board decided not to submit a written proposal for an alternative structure under Act 46 Section 9.

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P.O. BOX 1440
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05601-1440

39. Huntington conducted another merger vote by Australian Ballot on March 6, 2018, with two public forums held prior to the vote. Residents again voted by significant numbers against merger.

40. The State Board of Education and the Agency of Education informed Huntington that if ordered to merge with Mount Mansfield, the 2014 Articles of Agreement would apply to the July 2019 merger.

41. The Acting Secretary of Education issued a "Proposed Statewide Plan for School District Governance 2015 Acts and Resolves No. 46, Sec. 10(a)" on June 1, 2018. The Proposed Plan recommends that the State Board of Education "merge the Huntington Elementary School District and the Mount Mansfield Modified Unified Union School District into a single UUSD by requesting [Mount Mansfield] to accept the Huntington District as a full PreK-12 member."

42. A series of Act 46 meetings were held, including meetings at which the Huntington board presented testimony to the Agency of Education (on April 27, 2018) and to the State Board of Education (on August 15, 2018).

43. The State Board of Education did not hold evidentiary hearings or any kind of adversarial or other formal proceeding to adjudicate school districts' rights.

44. On November 30, 2018, the State Board of Education issued its "Final Report of Decisions and Order on Statewide School District Merger Decisions Pursuant to Act 46, Sections 8(b) and 10" ("the Final Report and Order").[4]

45. This Final Report and Order was not reviewed, approved or ratified by the General Assembly and was not the product of any adjudicative or rulemaking process. It is solely an internal Agency of Education/State Board of Education document.

TARRANT, GILLIES
& RICHARDSON
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P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

[4] The Report is dated November 28, 2018 but was issued on November 30, 2018.

46. The Final Report and Order designates the merger of schools into eleven new union school districts. Those new districts were subsequently certified as municipal corporations by the chair of the State Board of Education and the Secretary of the Agency of Education.

47. The Final Report and Order states that Huntington "did not make a compelling case sufficient to overcome the preferred governance structure presumption in Act 46 and did not assert that the merger is not 'possible' or 'practicable' to assume full PreK-12 membership in the unified district." For these reasons, and for "the reasons articulated in the Secretary's Proposed Plan for this district and as discussed at the Board's October 17, 2018 meeting leading up to its provisional decision for it," the Final Report and Order calls for merging Huntington and Mount Mansfield.

48. Item 16 of the "State Board of Education's 'order merging and realigning districts and supervisory unions where necessary,' pursuant to Act 46, Sec. 10(b)"—see Final Report and Order pp. 30, 35-36—approves the Secretary's proposal to merge Huntington into Mount Mansfield and "*[d]esignates* [Huntington] as a **prekindergarten through grade 12 member** of [Mount Mansfield], *provided that* a majority of the voters of [Mount Mansfield] present and voting at an annual or special meeting warned for the purpose on or before July 1, 2019 vote to approve the addition of [Huntington] as a prekindergarten through grade 12 member pursuant to 16 V.S.A. § 721." (original emphasis).[5]

49. Under item 16, at the time voters of Mount Mansfield approve the addition of Huntington, Mount Mansfield "shall be a unified union school district."

[5] Under the 2014 Articles of Agreement by which it was created, the correct title of Mount Mansfield as it exists today is the Mount Mansfield *Modified* Union School District. If in 2014 the voters in all towns had voted in favor of merger, the 2014 Articles of Agreement would have designated the fully merged district the "Mount Mansfield *Unified* Union School District." Item 16 appears to conflate these two titles by referring to Mount Mansfield as "Mount Mansfield *Modified Unified* Union School District."

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

50. Under item 16, the new unified union school district "shall supplant" Huntington on July 1, 2019 and begin providing pre-kindergarten through grade 12 education of students residing in Huntington on that date "under the terms and conditions specified in the union district's voter-approved Articles of Agreement." Item 16 also allows Huntington to continue to exist for up to six months to close out certain business.

51. Under item 16, Huntington would cease to exist after being merged with Mount Mansfield and upon closing out remaining business in the following six months.

52. The Final Report and Order includes default articles of agreement for many of the union school districts that it directs to be formed, but does not include default articles of agreement for Huntington, Mount Mansfield, or the new district that would be formed if the two were to merge.

53. No provision in Act 46, Act 49 or the Final Report and Order provides a mechanism for a school district to grieve the Final Report and Order.

COUNT I—Ultra Vires Administrative Action
2015 Acts and Resolves No. 46; 2017 Acts and Resolves No. 49; 16 V.S.A. § 721

54. The allegations set forth in the preceding paragraphs are hereby incorporated by reference.

55. The Secretary and State Board of Education have relied on Section 10 of Act 46 in mandating the merger of school districts. In particular, Section 10(b) requires the State Board of Education, by November 30, 2018, to publish "its order merging and realigning districts and supervisory unions where necessary."

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
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05601-1440

56. Section 10(e)(3)(B) of Act 46 as amended by Act 49[6] states in relevant part that Section 10 "shall not apply to . . . a district that, between June 30, 2013 and July 2, 2019, began to operate as a unified union school district and . . . is a regional education district or any other district eligible to receive incentives pursuant to [Acts 153 and 156]." 2015 Acts and Resolves No. 46, § 10(e)(3)(B), as amended by 2017 Acts and Resolves No. 49, § 8.

57. Mount Mansfield was formed pursuant to Acts 153 and 156 and has been receiving incentives pursuant to those Acts.

58. The Secretary and State Board of Education interpret MUUSDs as a type of unified union school district for the purposes of § 10(e)(3)(B). See State Board of Education Rule 3422; Secretary's Proposed Statewide Plan p. 61.

59. Because Mount Mansfield (1) receives incentives under Acts 153 and 156 and (2) is a unified union school district, Section 10—including the Final Report and Order issued pursuant to Section 10(b)—"shall not apply" to Mount Mansfield, and the State Board of Education cannot order it to be merged or otherwise alter its governance structure. See 2015 Acts and Resolves No. 46, § 10(e)(3)(B), as amended by 2017 Acts and Resolves No. 49, § 8.

60. Act 46, Section 10(d) directs "districts subject to merger" to either draft Articles of Agreement or be subject to default articles included in the Final Report and Order. 2015 Acts and Resolves No. 46, § 10(d), as amended by 2017 Acts and Resolves No. 49, § 8. By not including default Articles of Agreement for Mount Mansfield and Huntington and by ordering that the 2014 Articles of Agreement will continue to govern, the Final Report and Order implicitly acknowledges that Mount Mansfield and Huntington are not "districts subject to merger."

TARRANT, GILLIES
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44 EAST STATE STREET
P.O. BOX 1440
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05601-1440

[6] This same language was originally enacted pursuant to Act 46 under Section 10(c)(3)(B). The amendments of Act 49 merely changed the subsection from (c) to (e).

61. Nonetheless the Final Report and Order effectively orders the merger of Huntington and Mount Mansfield.

62. It does this by (1) "designat[ing]" Huntington as a member of Mount Mansfield; (2) purporting to delegate to Mount Mansfield the authority to force the merger of Huntington; and (3) requesting that Mount Mansfield vote on that merger. See Final Report and Order pp. 35-36.

63. These provisions of the Final Report and Order contravene the State Board of Education's own interpretation of § 10(c)(3)(B). They are ultra vires and must be struck.

64. Furthermore, the Final Report and Order calls for the MUUSD vote to be executed "pursuant to 16 V.S.A. § 721."

65. Section 721 envisions two tracks to merge an outside district with an existing union district: one track for when the outside district initiates the merger, and another where the existing union initiates the merger. The Final Report and Order provides no guidance as to which of these tracks would apply.

66. In any event, both tracks in § 721 require a vote in favor of merger by a majority of voters in the outside district. This means that, under § 721, voters in Huntington would hold a separate vote on merger, and the merger would not go forward if the majority voted against merger as Huntington has in several successive votes.

67. The Final Report and Order makes merger effective upon a commingled vote by all residents within the Mount Mansfield without any separate Huntington District vote.

68. This portion of the Final Report and Order thus ignores the protections afforded to Huntington by § 721, is ultra vires, and must be struck.

TARRANT, GILLIES
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44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

69. Huntington is entitled to relief from any such proposed, threatened, or actual unlawful action by the State Board of Education or the Agency.

COUNT II—Violation of Separation of Powers
Vt. Const. ch. II, §§ 6, 7

70. The allegations set forth in the preceding paragraphs are hereby incorporated by reference.

71. Huntington and Mount Mansfield are municipalities. 24 V.S.A. § 1751(1); 16 V.S.A. §§ 421, 701.

72. Only the General Assembly can form or dissolve a municipality. Vt. Const. ch. II, § 6.

73. The power to grant and amend town and village charters is non-delegable. *In re Municipal Charters*, 86 Vt. 562 (1913).

74. Acts 46 and 49 unlawfully delegate to the State Board of Education the power to form and dissolve municipalities by mandating the merger of school districts.

75. The manner of the attempted delegation is also inappropriate.

76. Act 46 § 10(b) directs the State Board of Education to publish an "order" on its website "merging and realigning districts and supervisory unions where necessary."

77. As an administrative agency of the executive branch, the State Board of Education is "authorized by law to make rules or to determine contested cases." 3 V.S.A. § 801. The State Board of Education has no authority to issue orders affecting legally protected interests outside of formal rulemaking or contested case procedures.

78. The State Board of Education's Final Report and Order purports to affect the legal rights of Huntington but is not the product of a formal rulemaking or contested-case process.

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

79. By issuing the Final Report and Order, the Executive Branch through the State Board of Education took action that was exclusively within the authority of the Legislative Branch.

80. The State Board of Education also unlawfully sub-delegated to a municipality the legislative power to create and dissolve towns in the Final Report and Order when it authorized Mount Mansfield to unilaterally dissolve Huntington.

81. In the alternative, Act 46 and 49 unlawfully sub-delegated to a municipality the power to create and dissolve towns when it authorized the State Board of Education to create a Final Report and Order through which Mount Mansfield is empowered to unilaterally dissolve Huntington. See Act 46, § 10(f)(1)(B) (as amended by Act 49, § 8) (giving a supplemental transitional facilitation grant to a MUUSD that votes to merge with another school district "either on its own initiative or at the request of the State Board").

82. In addition, a delegation of authority by the Legislature to an Executive Agency violates separation-of-powers principles where "there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of [the Legislature] has been obeyed." *Mistretta v. United States*, 488 U.S. 361, 379 (1989) (quotation omitted).

83. Under Act 46 § 5(c), the alternative governance structure is allowed if the preferred structure "may not be possible or the best model" to achieve Act 46 goals, and the alternative structure has smallest number of districts "practicable" and "achieved wherever possible by the merger of districts with similar operating and tuitioning patterns."

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

84. Under Act 46 § 8(b), the State Board of Education "shall approve the . . . continuation of a supervisory union" if it concludes that it is the "best means" of meeting Act 46 goals and ensures transparency and accountability.

85. Act 46, Section 10(b) requires the State Board of Education, by November 30, 2018, to publish "its order merging and realigning districts and supervisory unions where necessary."

86. Even if the General Assembly could delegate the power to form and dissolve municipalities, the delegation is defective because it lacks intelligible principles. Neither the General Assembly, nor the Agency of Education, nor the State Board of Education has defined key standards—"practicable," "possible," "the best model," "best means," "where necessary"—to approve or reject an alternative structure district.

87. Huntington is entitled to relief from any proposed, threatened, or actual action under this unconstitutional delegation of authority.

COUNT III—Unlawful Taking
US Const. Amend. V, Vt. Const. ch. I, Art. 9.

88. The allegations set forth in the preceding paragraphs are hereby incorporated by reference.

89. The Final Report and Order and Acts 46 and 49 require Huntington to convey all of its assets to Mount Mansfield for one dollar upon merger via Article 7 of the 2014 Articles of Agreement.

90. Huntington's assets include, among other things, a school building and liquid funds.

91. Without going through eminent domain procedures, the transfer of the school building and other items of property constitutes an intergovernmental taking that violates Chapter

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

1, Article 9 of the Vermont Constitution, the 5th Amendment of the U.S. Constitution and the 14th Amendment to the United States Constitution. *See, e.g., United States v. Town of Nahant*, 153 F. 520, 521 (1st Cir. 1907) (noting that confiscation of property from one government entity by another is a taking).

92. The forced transfer of money is per-se unconstitutional as money cannot be taken through eminent domain procedures.

93. Huntington is entitled to relief from any attempt by Defendants to effect this unconstitutional conveyance of its assets.

COUNT IV—Violation of the Vermont Administrative Procedure Act and Due Process Vermont Const., ch. 1, Art. 7 and 9, and ch. 2, § 6; U.S. Const., Amend. XIV, § 1

94. The allegations set forth in the preceding paragraphs are hereby incorporated by reference.

95. The Vermont Supreme Court "has consistently affirmed the necessity of the clear application of applicable standards in both judicial and administrative decisions." *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 20, 203 Vt. 274. Administrative action requires "neutral, predictable, and universal administrative standards." *In re Handy*, 171 Vt. 336, 349 (2000).

96. Under 3 V.S.A. § 801(b)(1), executive agencies are authorized to make rules or determine contested cases.

97. The Final Report and Order is neither the product of rulemaking nor the product of contested-case procedures.

98. If the Final Report and Order is viewed as an adjudicative act, it was produced without an opportunity for Huntington or other affected entities to present evidence, cross-examine witnesses, or exercise other rights intrinsic to an adjudicative process.

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

99. The State Board of Education has not made any specific findings of fact regarding Huntington; it merely incorporated by reference the Secretary's proposal and the minutes of meetings conducted by the State Board of Education at which Huntington representatives were present.

100. Nor has the State Board of Education defined any record of evidence on which factual findings could be based.

101. The Final Report and Order also orders that "existing" articles of agreement, i.e., the 2014 Articles of Agreement, will govern Mount Mansfield and Huntington through merger.

102. The 2014 Articles of Agreement are outdated and impossible to implement in their current form.

103. For example, the 2014 Articles of Agreement do not allow a unified district to be formed after 2015. Under Article 1 of the 2014 Articles of Agreement, if all towns vote to approve a merger, the Mount Mansfield Unified Union District will be formed July 1, 2015. Under Article 20, a district voting to remain independent may still join the union district by voting in favor to join by November 3, 2015. If the 2014 Articles of Agreement continue to apply, their plain language prohibits Huntington from joining in a unified union district after November 3, 2015.

104. Under Article 10 of the 2014 Articles of Agreement, the proposal for forming a unified union district was to take place November 4, 2014. The Articles contain no provision that would allow another vote at a later date, let alone a vote to force the merger of an NMED.

105. Furthermore, if the 2014 Articles of Agreement apply, the deadlines for certain protections for merged districts has passed. For example, Article 4 only protects employment contracts that were in place as of June 30, 2015. Under existing contracts, Huntington must

TARRANT, GILLIES
& RICHARDSON
44 EAST STATE STREET
P.O. BOX 1440
MONTPELIER, VERMONT
05601-1440

notify teachers and staff of any reduction in staffing by April 1, 2019. Under the 2014 Articles of Agreement, there would be no protection for teachers and staff.

106. Article 16 allows the union district board to adjust school attendance boundary lines only "one full school year following voter approval." Because this article refers to the November 2014 vote, it does not protect existing boundary lines today.

107. The State Board of Education's far-reaching conclusions in its Final Report and Order—including that Huntington must be dissolved and merged with Mount Mansfield and must operate under outdated Articles of Agreement—are unsupported by factual findings or a clear record of evidence, were not the product of formal rulemaking or contested-case procedures designed to comply with due process, are void for vagueness, arbitrary and capricious.

108. Huntington is entitled to relief from such unlawful and unconstitutional provisions of the Final Report and Order.

RELIEF

WHEREFORE, Plaintiff seeks:

A. A determination that Section 10 of Act 46, as amended by Act 49, does not apply to Huntington or Mount Mansfield and therefore the Final Report and Order cannot require Huntington to merge with Mount Mansfield;

B. In the alternative, a determination that Acts 46 and 49 are unconstitutional as applied to Huntington and that the relevant provisions are therefore void and have no effect on Huntington;

C. In the alternative, a determination that the Final Report and Order is unconstitutional as applied to Huntington and that the relevant portions of the Final Report and Order are therefore void and have no effect on Huntington;

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D. In the alternative, a determination that the execution of Acts 46 and 49, culminating in the Final Report and Order, violates Due Process and the VAPA as it relates to Huntington, and that the Final Report and Order as it relates to Huntington is void;

E. A permanent injunction preventing the State Board of Education, Agency of Education, and Mount Mansfield from forcing the merger of Huntington, taking or affecting any assets of Huntington, and exercising any authority purportedly under Acts 46 or 49 in relation to Huntington;

F. Reasonable attorney's fees and costs; and

G. Such other relief as the Court deems just.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable pursuant to Rule 38.

Dated this 20th day of December, 2018 at Montpelier, Vermont.

HUNTINGTON SCHOOL DISTRICT

By: _____

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STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Washington Unit — Docket No. ___-___-___ Wncv

HUNTINGTON SCHOOL DISTRICT,	)
Plaintiff / Appellant,	)
v.	)
VERMONT STATE BOARD OF EDUCATION,	)
and	)
VERMONT AGENCY OF EDUCATION,	)
and	)
MOUNT MANSFIELD MODIFIED UNION SCHOOL DISTRICT,	)
Defendants / Appellees.	)

PLAINTIFF / APPELLANT'S MOTION FOR PRELIMINARY INJUNCTION and MOTION FOR STAY

NOW COMES Plaintiff / Appellant Huntington School District, by and through its attorneys, Tarrant, Gillies & Richardson, LLP, and moves for a preliminary injunction pursuant to Vermont Rule of Civil Procedure 65 or, in the alternative, a stay pursuant to Vermont Rule of Civil Procedure 75(c).

On November 30, 2018, the State Board of Education issued its "Final Report of Decisions and Order on Statewide School District Merger Decisions Pursuant to Act 46, Sections

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8(b) and 10" (the "Final Report and Order").[1] The Final Report and Order "designates" Huntington a member of the Mount Mansfield Modified Union School District ("Mount Mansfield"), provided that a majority of voters living in the Mount Mansfield district vote in favor of merger on or before July 1, 2019.

Simultaneously with the present motion Huntington has filed a complaint and appeal from the State Board of Education's Final Report and Order arguing that it violates a number of constitutional and statutory provisions.

By the present motion Huntington moves the Court to:

1. enjoin, pursuant to V.R.C.P. Rule 65, all provisions of the Final Report and Order purporting to affect Huntington from going into effect;
2. enjoin, pursuant to V.R.C.P. Rule 65, the Defendants from acting on any authority that the Final Report and Order purports to grant them;
3. in the alternative, pursuant to V.R.C.P. Rule 75(c), stay all provisions of the Final Report and Order purporting to affect Huntington from going into effect pending resolution of Huntington's complaint and appeal.

Huntington presents the following memorandum of law in support of its motion.

Memorandum

I. Legal Standard: Rule 65 Injunction and Rule 75 Stay

Rule 75(c) grants trial courts broad authority to stay an administrative order—such as the State Board of Education's Final Report and Order, here—from going into effect and maintain the status quo pending appeal. Rule 65(b) allows trial courts to enjoin parties from acting pending trial. The decision to grant either a stay or injunction is discretionary, and the two measures may

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[1] The Report is dated November 28, 2018 but was issued on November 30, 2018.

result in "essentially the same remedy." *Morean-Usher v. Town of Whitingham*, 158 Vt. 378, 381 (1992). In this matter, a stay would prevent item 16 of the Merger Order within the Final Report and Order from going into effect pending resolution of the appeal, while an injunction would prevent the Defendants from acting on item 16, or otherwise, to merge Huntington and Mount Mansfield.

Rule 75 authorizes a court to stay an administrative agency act pending appeal upon such terms and conditions as are "just," while Rule 65 does not identify a standard under which a preliminary injunction should be issued. Nevertheless, Courts have considered the same factors when granting stays or preliminary injunctions: "(1) the threat of irreparable harm to the movant; (2) the potential harm to the other parties; (3) the likelihood of success on the merits; and (4) the public interest." *Taylor v. Town of Cabot*, 2017 VT 92, ¶ 19, ___ Vt. ___ (in determining whether to grant preliminary injunction) (citing *In re J.G.*, 160 Vt. 250, 255 n.2 (1993)); see also *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) (in determining whether to grant a stay).

Federal Courts have applied a balancing or "sliding scale" of the preliminary injunction factors, in which a lesser showing on one factor may be counterbalanced by a stronger showing on other factors. C. Wright & A. Miller, Federal Practice & Procedure § 2948.3 (3d ed. 2017). The Vermont Supreme Court recently called for a similar balancing of factors, explaining that:

> [i]nsofar as our test calls for a balancing of multiple factors, including the likelihood of success on the merits, it is sufficiently flexible to allow for a preliminary injunction in cases in which the court cannot definitively conclude that the movant is likely to prevail on the merits, but the balance of other factors tips strongly in favor of an injunction.

Taylor, 2017 VT 92, ¶ 19 n.3.

II. The threat of irreparable harm to Huntington is high if the injunction or stay is not granted.

Once the merger process is set in motion, it will set off a series of cascading events that

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will harm Huntington and which cannot be undone.

a. If the process set out in the Final Report and Order moves forward, Mount Mansfield is nearly certain to vote to merge Huntington.

Acting contrary to the exemption set out in Act 46 § 10(e)(3)(B), as revised by Act 49, the State Board of Education has requested Mount Mansfield to vote on merging Huntington. A majority of voters in the Mount Mansfield have already twice voted to merge all of the elementary districts, including Huntington, into a single unified union school district ("UUSD"). Based on this track record, and absent any evidence to the contrary, Mount Mansfield voters will almost certainly vote again to merge Huntington.

b. If Mount Mansfield votes to merge Huntington, the latter will cease to exist.

Huntington's complaint explains that the General Assembly has no authority to delegate to the State Board of Education the power to dissolve a school district; that the Final Report and Order cannot apply to the Mount Mansfield and, by extension, Huntington; and that the process for merger is deeply flawed by ambiguities and unknowns.

If this mis-delegated, flawed process moves forward, Mount Mansfield voters will almost certainly vote to merge and Huntington will dissolve.

It is hard to imagine a harm more irreparable to a moving party than eliminating it as an entity. Having been voted out of existence, Huntington would be unable to pursue the claims set out in this complaint and appeal, or to exercise its rights in any other way.

c. Decisions and acts taken by an improperly merged UUSD board cannot be clawed back.

Under Act 46, new UUSDs have 90 days to draft new articles of agreement that govern the new UUSD going forward. Act 46, § 10(d)(1). If this deadline is not met, then default articles of agreement issued with the Final Report and Order apply. 2015 Acts and Resolves No. 46, § 10(d).

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The Final Report and Order, however, has no default articles for Huntington and Mount Mansfield. Instead, it states that if and when the two districts merge, the new UUSD will provide for education of students "under the terms and conditions specified in the union district's voter-approved Articles of Agreement." Final Report and Order p. 35. This suggests that the existing Mount Mansfield board would continue governing the new UUSD under the 2014 Mount Mansfield Articles of Agreement.

If the existing board begins to immediately govern the new UUSD, it will have new powers over Huntington. See 16 V.S.A. § 723 ("On the day the establishment of a unified union school district becomes effective, the district gains title to the assets and assumes the existing contractual obligations and other liabilities of the member school districts within its borders"); 16 V.S.A. § 706q(a) (the powers of the board of directors of a unified union school district are coequal to those of a town school district board of directors). Among these new powers will be control over Huntington's current budget (16 V.S.A. § 563(8)), the ability to take on new debt (16 V.S.A. § 563(21)), the ability to apply for and issue grants (16 V.S.A. § 563(22)), control over and the power to dispose of Huntington's property (16 V.S.A. § 563(3)), the ability to discontinue the use of the Brewster-Pierce Memorial School in Huntington Center (16 V.S.A. § 563(7)), the ability to suspend or dismiss teachers and principals now employed by Huntington (16 V.S.A. §§ 243, 1752),[2] and the ability to reconfigure what students go to Brewster-Pierce Memorial School (2014 Articles of Agreement, Article 15).

[2] On November 8, 2018, Mount Mansfield voted to close the Underhill ID Elementary school, demonstrating its inclination toward closing the schools of its member districts. See https://vtdigger.org/2018/11/08/district-school-board-votes-close-underhill-elementary-school/. Under the existing structure, Huntington must notify teachers of a reduction in work force by April 1. It is unclear whether a new UUSD formed before or after that time could fire teachers that the Huntington planned to retain.

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Furthermore, the board will be responsible for preparing a budget for the new UUSD for the coming school year.[3]

Many of these acts, if taken, will be irreversible. Teachers fired cannot be expected to wait out a litigation of unknown duration to be rehired. New debt cannot be discharged, and grants issued cannot be revoked. Money allocated and spent under a new budget cannot be unspent. Furthermore, if Huntington prevails, then the new UUSD that would have been created would cease to exist and there would be no entity against which to assess damages. See C. Wright & A. Miller, Federal Practice & Procedure § 2948.1 (3d ed. 2017) (explaining that irreparable harm may be found where there is "a risk that the defendant will become insolvent before a judgment can be collected").

d. To the extent the State would be responsible for harm caused under an unlawful merger, the State enjoys immunity.

Economic damages are generally not irreparable, because they can be "undone" through repayment. *Taylor*, 2017 VT 92, ¶ 42. "However, where the party seeking injunctive relief is legally precluded from pursuing damages—for example, if a claim is barred by the Eleventh Amendment—irreparable harm is established." *Cal. Hosp. Assn v. Maxwell-Jolly*, 776 F. Supp. 2d 1129, 1140 (E.D. Cal. 2011) (citing *Cal. Pharm. Assn. v. Maxwell–Jolly,* 563 F.3d 847, 852 (9th Cir. 2009). The doctrine of sovereign immunity precludes seeking repayment through a damages action against the state. See, e.g., *Jacobs v. State Teachers' Ret. Sys. of Vermont*, 174 Vt. 404, 408 (2002). The involuntary transfer of Huntington's assets would thus

[3] Mount Mansfield and Huntington are currently each planning to prepare their budgets in January 2019, to be warned in February, and to be voted on at Town Meeting Day in March. Huntington will take a floor vote on the Huntington budget at the March 2019 town meeting, while Mount Mansfield will vote by Australian ballot at the March 2019 town meeting. If and when the new UUSD is formed, it is not clear whether it will create a new budget, adopt or modify the existing Mount Mansfield and Huntington budgets, or create a new budget.

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be irreparable.

III. An injunction or stay is not likely to harm other parties.

If an injunction is imposed, the residents of the CESU member towns will continue to bear the costs of the supervisory union, which would otherwise cease to exist if Huntington and Mount Mansfield were to merge. It is unclear whether and to what degree this would cause any actual harm, because there is little to no actual data regarding whether a new UUSD would realize any cost savings associated with an immediate (or future) merger.

Otherwise, an enjoined Mount Mansfield will be able to continue operating as a modified union district, as it has since 2015.

IV. The public interest weighs strongly in favor of an injunction or stay.

The transfer of control to the UUSD is not only likely to irreparably harm the Huntington School District, under the first prong above, but is also likely to irreparably harm school-aged children and their families. As noted above, the merger would give the new UUSD board the power to fire or suspend teachers and other staff, realign districts, and allocate funds (or not allocate funds) through the budget process. The firing of one Brewster-Pierce Memorial School teacher may irreparably harm students at that school because that teacher cannot later be brought back to re-teach a given grade to a given set of students. The closure of the school, even for a short time, would likewise irreparably harm students. School closure or reconfiguration of the district in a way that would require Brewster-Pierce students to attend a different elementary school would also interrupt the lives of students and their families in a manner that would be irreparable. See *Rochester-Genesee Reg'l Transp. Auth. v. Brigid Hynes-Cherin*, 506 F. Supp. 2d 207, 214 (W.D.N.Y. 2007) (holding that the "chaos and confusion in families of school-age children that could result" from an agency's decision to alter school bus services is a public interest concern that strongly militates in favor of a stay, and giving this public interest concern

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the most weight among all injunction factors).

Given the number of ambiguous or unknown aspects of the Final Report and Order and underlying legislation as detailed in Huntington's complaint, the new UUSD board will have to guess at proper procedures, will inevitably make errors, and will attempt to rectify those errors. All of this confusion and chaos will be at the expense of stability and predictability for schoolchildren and their families. These circumstances militate in favor of preserving the status quo.

V. The complaint and appeal are likely to succeed on the merits.

Huntington's complaint and appeal is likely to succeed on the merits, as set out in detail in that filing.

First, the State Board of Education's attempt to direct the merger of Mount Mansfield and Huntington is ultra vires because Acts 46 and 49 specifically exempt modified union districts with non-member elementary districts like Mount Mansfield and Huntington. 2015 Acts and Resolves No. 46, §10(e)(3)(B), as amended by 2017 Acts and Resolves No. 49, § 8.

Second, even if the Board can direct the merger, the method that it calls for, which allows merger pursuant to a unilateral vote by Mount Mansfield, violates 16 V.S.A. § 721.

Third, the ability to form and dissolve municipalities, including school districts, is the exclusive province of the legislature and is non-delegable. Vt. Const. ch. II, § 6; In re Municipal Charters, 86 Vt. 562 (1913).

Fourth, a forced merger would require Huntington to convey all of its assets, including a school building, in violation of Chapter 1, Article 9 of the Vermont Constitution, the 5th Amendment of the U.S. Constitution and the 14th Amendment to the United States Constitution.

Fifth, the process to determine whether schools should merge under Acts 46 and 49 was improperly carried out by the State Board of Education in violation of the 14th Amendment to the

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United States Constitution and Chapter 1, Articles 7 and 9 and Chapter 2, Section 6 of the Vermont Constitution.

Huntington notes that this final injunction factor requires the movant to at least present a prima facie case, but not necessarily a certainty of winning. C. Wright & A. Miller, Federal Practice & Procedure § 2948.3 (3d ed. 2017). The likely outcome on the merits carries less weight where, as here, the failure to impose an injunction will likely harm Huntington and the public, while there will be little to no harm to any other party if the preliminary injunction motion is granted. *Id.*; see also *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (treating preliminary injunction factors as a "sliding scale" where if the likelihood of harm without an injunction is great, the movant has a lesser burden to prove that success on the merits is likely).

In considering a stay of an administrative agency's decision, the Vermont Supreme Court has also considered the "thoroughness and completeness of the [underlying administrative body's] decision" when weighing the likelihood of the movant's success on the merits. *In re Petition of Vermont Gas Sys., Inc.*, 2016 VT 132, ¶ 4, 203 Vt. 655 (mem.). Thoroughness and completeness—or, more specifically, the lack thereof—are particularly relevant here. The decision appealed from is the Final Report and Order. Unlike a typical administrative decision from which an appeal would be taken, that plan was not born of a quasi-judicial or quasi-legislative process. It is instead the product of an ill-defined, informal process that lacked transparency or meaningful participation. Moreover, the Final Report and Order does not contain findings of fact or refer to a clear record of evidence. As such, Huntington had no mechanism by which to present its case, challenge the State Board of Education or Secretary's findings, or meaningfully argue for a different outcome. The lack of formal process is a strong reason why the Final Report and Order should be enjoined for the pendency of this litigation.

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Conclusion

For the reasons set out above, Huntington requests the Court grant a preliminary injunction against the State Board of Education, the Agency of Education, and the Mount Mansfield Modified Union School District, and stay the effect of all provisions of the Final Report and Order relating to Huntington.

Dated this 20th day of December, 2018 at Montpelier, Vermont.

HUNTINGTON SCHOOL DISTRICT

By: _____

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